DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St., Denver, CO 80202	DATE FILED: February 22, 2021 2:54 PM CASE NUMBER: 2019CV32310
Plaintiff: **TODD SHEPHERD,** v. Defendant: **JENA GRISWOLD, in her Official Capacity as Colorado Secretary of State**	▲ COURT USE ONLY ▲ Case Number: 19CV32310 Ctrm: 275

ORDER RE: ORDER TO SHOW CAUSE

THIS MATTER is before the court on the court's Order To Show Cause. The court, having reviewed the Secretary of State's Opening Brief, Plaintiff Shepherd's Response Brief, and the Secretary of State's Reply Brief, and having reviewed the documents submitted by the Secretary *in camera*, and being otherwise fully advised the premises, hereby FINDS and ORDERS as follows.

FACTUAL AND PROCEDURAL BACKGROUND

On January 23, 2019, Defendant Jena Griswold ("Secretary") testified before the Senate Committee on State, Veterans and Military Affairs with respect to Senate Bill 19-42, which pertained to Colorado joining the National Popular Vote Interstate Compact. That legislation was eventually adopted, and signed into law on March 15, 2019.

On February 4, 2019, Plaintiff Todd Shepherd served a request for documents upon the Secretary of State pursuant to the Colorado Open Records Act ("CORA"), seeking to obtain the following:

> A copy of all writings created or received by any of the named persons below, between and including the dates of January 14-30, 2019, and which contain any of the following keywords (ignoring case): "national popular vote" or "national popular vote interstate compact" or "NPV" "NPVIC" or SB 42" or SP-042" or SB-42" or "19 42" or "19-42" or "Electoral College"
>
> From the following persons: Secretary Griswold, Ben Schler, Jud Choate, Jennie Flannigan, Serena Woods, Shad Murib

Opening Br., Ex.1-B, at 3. On February 8, 2019, the Department produced 115 pages of documents to Mr. Shepherd, but also informed him that they were withholding non-public documents on the basis that they constituted work product. Plaintiff requested that the Secretary authorize the release of the documents. She declined. Opening Br., Ex. 1-D.

Plaintiff Shepherd served the statutorily required notice of his intent to file a legal challenge, and the parties engaged in the statutorily required conference on May 30, 2019. They did not reach an agreement.

The plaintiff filed his complaint on June 13, 2019. The court held a hearing on July 2, 2019, at which time it was decided that it would not be necessary for Defendant to file responsive pleading, and the court set up a briefing schedule, indicating that a *Vaughn* index would not be necessary at that time. The court then issued its Order to Show Cause.

With her Opening Brief, the Secretary submitted for the court's *in camera* review a notebook of the 121 documents she had withheld from Plaintiff, bearing Bates numbers COSOS 00116 – COSOS 00236, and arranged behind 15 numbered tabs. The Secretary also submitted as Ex. 1 to her Opening Brief the Affidavit of Melissa Polk, which the court finds describes the documents in sufficient detail to amount to the substantial equivalent of a *Vaughn* index. *See, City of Colorado Springs v. White*, 967 P.2d 1042, 1056 (Colo. 1998).

APPLICABLE LAW

Plaintiff's request for the documents was made pursuant to CORA, C.R.S. §24-72-200.1 et. seq, in which the General Assembly stated that it is "the public policy of this state that all public records shall be open for inspection by any person in reasonable times, except as provided in this part two or as otherwise specifically provided by law." C.R.S. §24-72-201.

CORA'S definition of "Public records" appears in C.R.S. §24-72-202, and provides, in relevant part, as follows:

> (6)(a)(I) "Public records" means and includes all writings made, maintained, or kept by the state, any agency…. for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.
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> (II) "Public records" includes the correspondence of elected officials, except to the extent that such correspondence is:
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> (A) Work product;
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> * * * * *
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> (b) "Public records" does not include:
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> * * * * *

(II) Work product prepared for elected officials. However, elected officials may release, or authorize the release of, all or any part of work product prepared for them.

In amendments enacted in 1996, the General Assembly expanded the definition of work product contained in C.R.S. §24-72-202 by the addition of a new subsection (6.5), which provides as follows:

> (6.5)(a) "Work product" means and includes all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority. Such materials include, but are not limited to:
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> (I) Notes and memoranda that relate to or serve as background information for such decisions;
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> (II) Preliminary drafts and discussion copies of documents that express a decision by an elected official.
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> (b) "Work product" also includes:
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> (I) All documents relating to the drafting of bills or amendments, pursuant to section 2-3-304(1) or 2-3-505(2)(b), but it does not include the final version of documents prepared or assembled pursuant to 2-3-505(2)(c), C.R.S.
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> * * * * *
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> (c) "Work product" does not include:
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> (I) Any final version of a document that expresses a final decision by an elected official
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> * * * * *
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> (d) (I) In addition, "work product" does not include any final version of a document prepared or assembled for an elected official that consists solely of factual information compiled from public sources. The final version of such a document shall be a public record.

In *City of Colorado Springs v. White*, 967 P.2d 1042, 1050, 1055 (Colo. 1998), the Supreme Court recognized the deliberative process privilege as a part of the common law of Colorado, and that it amounted to a "privilege" within the meaning of C.R.S. §24-72-204(3)(a)(IV). Plaintiff Shepherd contends that the deliberative process privilege recognized in *White* is "identical" to the work product exception contained within CORA, only the statutory

exception is narrower. Response Br., at 4. The *White* court itself stated as follows with respect to this issue:

> In the 1996 amendments to the open records laws, the General Assembly did not manifest an intent to alter the common law deliberative process privilege, either expressly or by clear implication. The exemptions from the definition of a public record created by the amendments are neither coextensive nor necessarily inconsistent with the deliberative process privilege. The amendments protect from public inspection certain materials, such as correspondence from constituents, that would not automatically be protected by the deliberative process privilege.

967 P.2d at 1055-1056. Thus, the Supreme Court actually regarded the 1996 amendment to the definition of the "work product" exception to "Public records" as creating a broader protection than the common law deliberative process privilege.

ANALYSIS

The 121 pages of "non-public" documents produced by the Secretary fall into two categories. First, 117 of those pages constitute a series of emails with attachments between Secretary Griswold and various members of her office named in Shepherd's CORA request, which are located between tabs1-13 of the notebook, and comprise documents Bates numbered COSOS 00116 – COSOS 00232. Second, there are 4 pages of emails between a member of the Secretary's office and a State Senator with respect to the National Popular Vote Interstate Compact, which was the subject of HB 19-42, and are located behind tabs 14-15 and comprise documents Bates numbered COSOS 00233- COSOS 00236. The court will consider each of these types of documents separately.

1. Inter-Agency Emails and Attachments

The series of emails between Secretary Griswold and the members of her office were exchanged during the period January 16-29, 2019, and are heavily concentrated during the period January 19-23, 2019. They all focus on the Secretary's testimony to the Senate committee. The bulk of them involve several email strings between the Secretary and several of the members of her office, with serial attached drafts of the Secretary's planned testimony to the Senate committee. Those drafts evolve over time as several different people contribute thoughts, new editing, supplementation, and comment. In any event, they are all focused on the Secretary's decision to testify before the committee, and what she would say on that occasion. In later drafts, a section is added pertaining to issues the legislators were likely to question her about, and the Secretary's proposed responses.

The court finds that this series of email strings fall squarely within the definition of "work product" contained in the 1996 amendments to CORA, and therefore do not constitute public records subject to disclosure, on at least two grounds. First, the attachments to the emails are clearly "preliminary drafts and discussion copies of documents," that being Secretary Griswold's prepared testimony to the committee, which "express a decision by an elected official," that being the Secretary's support for the bill, and her analysis regarding the effect

which its adoption would have upon her office's fundamental functions with respect to the conduct of presidential elections and certifying the results thereof, all within the meaning of C.R.S. §24-72-202(6.5)(a)(II).

Second, significant portions of the emails also fall within the statutory definition of "Notes and memoranda that relate to or serve as background information for such decisions," as they refer to legal and historical support for her position, informed analysis of the effect which the legislation would have upon various aspects of elections in Colorado and the functions of her office, the status of some pending litigation pertaining to the electoral college, as well as a table depicting the status of various legislation of interest to the Secretary, including SB 19-42. The court notes that the statutory definition of "writings," which is the principal operating word in the umbrella definition of "Public records," C.R.S. 24-72-202(6)(a)(I), and was the general category of documents Plaintiff Shepherd requested, *see supra*, at 1, includes "digitally stored data, including without limitation electronic mail messages…" C.R.S. §24-72-202(7). That being the case, these documents do not meet the definition of "Public records" which must be produced pursuant to CORA. C.R.S. §24-72-203(1)(a)("All *public records* shall be open for inspection by any person at reasonable times…[emphasis supplied]").

Plaintiff Shepherd urges the court to find that these email messages do not meet these categorical statutory definitions of work product because Secretary Griswold's determination to appear and testify before the Senate committee did not amount to "a decision within the scope of [her] authority" within the meaning of C.R.S. §24-72-202(6.5)(a). Plaintiff first argues that the Secretary has been far too imprecise as to exactly what "decision" the documents purportedly relate to, and that in any event the word decision "refers to actions taken in an official capacity that become agency policy or final adjudications – basically rule-making or adjudicatory actions." Response Br., at 5-7. Even recognizing the "strong presumption in favor of disclosing records" which requires courts "to construe any exceptions to CORA's disclosure requirements narrowly," *Jefferson County Education Association v. Jefferson County School District R-1*, 378 P.3d 835, 838 (Colo. App. 2016)(internal citations omitted), the court must reject this argument, as it would require the court to effectively supplement the statutory language. The statutory definition of work product only refers to "a decision," without further qualification, modification or elaboration with respect to the significance of the decision. Had it been the legislature's intent to so severely limit the nature and level of decision necessary to qualify as work product, they could certainly have done so explicitly, but did not.[1]

Second, Plaintiff argues that testifying before the legislature, which he characterizes as "lobbying," does not fall "within the scope of [the secretary of state's] authority," relying

[1] The court notes that documents Bates numbered COSOS 00219 – COSOS 00229, behind tabs 10 and 11, are two tables of legislative bills which were apparently of interest to the Secretary. Opening Br., Ex. 1, Polk affidavit, ¶ 21, at 6. Although at least one of those tables appears to be dated after the Secretary's testimony to the Senate committee, the court finds that they are work product within the meaning of C.R.S § 24-72-202(6)(b)(II), because they were prepared for her as an elected official, albeit not exclusively with respect to her decision to testify regarding SB 19-42. Based upon the titles of the bills being tracked, all of the legislation abstracted in the tables appear to be within the scope of her office's duties. *Cf., White, supra*, 967 P.2d 1042, 1057 (under the deliberative process privilege recognized as a part of Colorado common law "the government need not be able to point to a specific decision or policy in connection with which the material was prepared in order for the material to be considered predecisional.")

principally upon the enumeration of the "duties" of that office set forth in C.R.S. §1-1-107, which do not explicitly include testifying before the legislature. Response Br., at 7-10. Initially, the court notes that the statute upon which Plaintiff relies only *prohibits* the secretary of state from "serving as the highest ranking official, whether actual or honorary, in the campaign of any candidate for federal or state wide office [other than their own]" C.R.S. §1-1-107 (7). One would expect that any similar prohibition on testifying before the legislature which the General Assembly intended to impose upon the office of secretary of state would have been expressed similarly. *See, e.g., Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001)("Under the rule of interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others," citing *Dill v. People*, 94 Colo. 230, 235, 29 P.2d 1035, 1037 (1933)). In fact, however, "each principal department of state government," is actually required to designate a lobbyist, and register that lobbyist with the secretary of state. C.R.S. § 24-6-303.5(1)(a) and C.R.S. §24-1-110(1)(a)(Department of State is a "principal department" created by that article). More broadly, although it may not be an enumerated duty or power of her office, it is certainly within the authority of the Secretary of State to testify regarding legislation pending before the General Assembly which would affect the function and operation of her office, and which the legislature no doubt occasionally finds helpful. *Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004)(the state treasurer has "the right, and perhaps the duty, to speak out on matters of concern to his office or to the electorate.") With respect to the legislation at issue, it is difficult to imagine a more appropriate witness than the secretary of state to comment upon how the bill would fundamentally change how presidential electors are selected and certified by that office.

Accordingly, the court finds that the intra-agency emails and their attachments all constitute work product within the meaning of the statutory definition, and therefore are not public records subject to disclosure under CORA.

2. Inter-Agency Emails

With respect to the email exchanges with the State Senator, the court again finds that those fall within the statutory definition of work product as being "inter-agency advisory or deliberative materials assembled for the benefit of elected officials…" C.R.S. §24-72-202(6.5). The court concludes that the legislature constitutes another "agency" of the state government for purposes of this statutory definition. Although CORA nowhere defines "agency," the statutory definition of "work product" includes "[a]ll documents relating to the drafting of bills or amendments, pursuant to 2-3-304(1) or 2-3-505(2)(b), C.R.S." The first cross-referenced statute pertains to the Legislative Council, whose director of research "shall be responsible… for the preparation of…bills" and documents prepared or assembled by him "shall be considered work product, as defined in section 24-72-202(6.5), C.R.S." The second cross-referenced statute creates the Office of Legislative Legal Services, whose function includes "draft[ing] or aid[ing] in drafting legislative bills," C.R.S. § 2-3-504(1)(a), and documents prepared or assembled by it, other than the introduced version of a bill or amendment "shall be considered work product, as defined in section 24-72-202(6.5), C.R.S." *See, Ritter v. Jones*, 2078 P.3d 954, 958 (Colo. App. 2009). Thus, the principal activity of the legislature is certainly contemplated in the statutory definition of "work product," such that communications between members of the legislature and other elected officials in the state government would fall within the definition of "inter-agency" communications. Further, the court's *in camera* review of the documents behind tabs 14 and 15 demonstrates that such inter-agency communications are "deliberative in nature and are

communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority," within the meaning of the statutory definition. Accordingly, again, they do not amount to "public records" which must be produced pursuant to CORA.

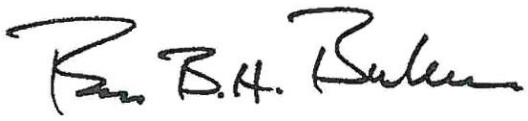
CONCLUSION

For all the foregoing reasons, the Order to Show Cause is HEREBY DISCHARGED. The documents withheld by the Secretary all constitute work product, and therefore are excluded from the definition of "public records" subject to disclosure under CORA.

In order that the court's record will be complete, the Secretary is HEREBY ORDERED to upload the documents bearing Bates numbers COSOS 00116 through COSOS 00236, together with the 15 numbered dividers as they were supplied to the court for its *in camera* inspection, to CCE, with instructions to the court clerk that they be filed as a "Sealed Court Record " within the meaning of §3.07 of Chief Justice Directive 05-01(as amended October 18, 2016) pursuant to this Order. The effect of such instruction and such designation of the documents in the Register of Actions will be that the documents cannot be accessed by anyone, including the parties or counsel, without further order of the court.

DATED this 22nd day of February, 2021.

BY THE COURT:



Ross B.H. Buchanan
Denver District Court Judge